

No. 12590.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN L. CARTY, H. McCORMICK, EUGENE DOUD,
JAMES R. DOUD, VINCENT DOUD, RAYMOND E. FAR-
RELL, JAMES D. McCORMICK, ROBERT MAULHARDT and
EDWARD C. MAXWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

	PAGE
Statement of pleadings and facts disclosing jurisdiction.....	1
Statement of the case.....	2
Facts	2
Questions involved	8
Argument	9
Summary	9

I.

The court committed no error by not instructing the jury on the issue of entrapment.....	12
A. Where there is no possibility of entrapment, that issue may not be given to the jury. It is only where the trial court finds there is or may be an entrapment, that the defendant is entitled to an instruction thereon.....	12

II.

The court committed no error in giving the Government's Requested Instruction No. 19-A.....	19
A. If any error was committed the defect was cured by other instructions and therefore was harmless.....	19
Conclusion	31

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Brandenburg v. Doyle, 12 Fed. Supp. 342.....	17
Brown v. United States, 260 Fed. 752.....	12
Cerritos Gun Club v. Hall, 96 F. 2d 620.....	17, 19, 24, 25, 26, 27, 28
Clarke v. United States, 132 F. 2d 538; cert. den. 318 U. S. 789..	30
Farber v. United States, 114 F. 2d 5; cert. den., 311 U. S. 706....	12
Hargreaves v. United States, 75 F. 2d 68; cert. den. 295 U. S. 759	29
Missouri v. Holland, 252 U. S. 416.....	17
Mullaney v. United States, 82 F. 2d 638.....	31
Newman v. United States, 299 Fed. 128.....	15
Pine v. United States, 135 F. 2d 353; cert. den. 320 U. S. 740....	30
Ratigan v. United States, 88 F. 2d 919.....	13
Roubay v. United States, 115 F. 2d 49.....	30
Shouse v. Moore, 11 Fed. Supp. 784.....	17
Sorrells v. United States, 287 U. S. 435.....	9, 13, 17
Taylor v. United States, 142 F. 2d 808; cert. den. 323 U. S. 723	29
United States v. Bates, 141 F. 2d 435.....	13
United States v. Olson, 41 Fed. Supp. 433.....	14, 16
United States v. Reese, 27 Fed. Supp. 833.....	14
United States v. Schulze, 28 Fed. Supp. 234.....	14
United States v. Sorcey, 151 F. 2d 899.....	29

MISCELLANEOUS

Report of the Special Committee on Conservation of Wildlife Resources to the 77th Cong., 1st Sess. (Senate Resolution 246)	16
--	----

STATUTES

Fish and Wildlife Service, Regulation 6.2.....	14
Migratory Bird Treaty Act (16 U. S. C. A., Secs. 703-711).....	19
Migratory Bird Treaty Act, Sec. 6.3.....	19
United States Code, Title 16, Sec. 703.....	1
United States Code, Title 18, Sec. 3231.....	2
United States Code, Title 28, Sec. 1291.....	2

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This is an appeal from a judgment of conviction for the violation by appellants of Section 703, Title 16, United States Code, and regulations pertinent thereto, which makes it an offense to hunt and kill or attempt to kill and take migratory waterfowl and migratory game birds over baited ponds and also by means, and use of shelled wheat, corn, and other grain, or other feed deposited, distributed and scattered so as to constitute for such birds a lure, attraction, or enticement to fly over the area where hunters are attempting to take them. All appellants were charged with the aforesaid violation jointly in a one count Information, and trial by jury was had in the United States

District Court for the Southern District of California at Los Angeles, Calif., resulting in a conviction of said offense. The jury returned the verdict of guilty on March 9, 1950. A motion for new trial was made, heard and denied on March 20, 1950, by the Honorable Harry C. Westover, Judge presiding. On the same date the Court sentenced each of the appellants to pay a fine to the United States in the sum of \$500 each.

A notice of appeal to this Court was filed on March 24, 1950, at Los Angeles, Calif., which Court has appellate jurisdiction under Title 28, U. S. C., Section 1291. The District Court had jurisdiction under Section 3231 of Title 18, U. S. Code.

Statement of the Case.

Facts.

The statement of facts set forth in appellants' opening brief, commencing on page 2 thereof, is not acceptable to appellee for the reason that the statement is too selective and interpretative as well as argumentative. The following summary of the evidence pertinent to the questions before this Court is submitted as a more objective synopsis, as opposed to the "shotgun approach" to the facts made by appellants.

At approximately 6:00 o'clock P. M., October 21, 1949, Deputy United States Game Wardens inspected the premises of the Santa Clara Game Preserve near Oxnard, California, at which time it was observed that the ponds, dikes and roadways of such premises were heavily covered with threshed barley and lima beans. United States Game

Management, Agent, A. W. Elder, of Los Angeles, was that evening notified of such fact; later the same evening Agent Elder further inspected the premises and confirmed the observations made by the Deputy United States Game Wardens.

On the following morning, October 22, 1949, at 7:00 o'clock A. M., the defendants were observed among others hunting and taking wild ducks on the said premises of the Santa Clara Game Preserve. Thereupon Agent Elder and the Deputy United States Game Wardens, all of whom had been making such observations, entered upon the said premises, as some of the hunters were beginning to leave their duck blinds where they were shooting. On entering the premises it was again observed that a roadway thereon, adjacent to the ponds, and several of the dikes upon the premises, were covered with lima beans and threshed barley. As the hunters came in from their hunting stations their names and addresses were taken, their thirty-five ducks and one goose confiscated, and each hunter notified of an apparent violation of the Federal Laws against baiting of migratory waterfowl. All defendants except Vincent Doud and Raymond W. Farrell were so apprehended and their ducks confiscated at this time. At about 1:30 P. M. of the same day the other two defendants were observed shooting over the same premises, under the same conditions as aforesaid. They were likewise notified by Agent Elder and Deputy United States Game Wardens of the Federal violation and their birds confiscated.

Thus, there are two essential elements of the offense charged in the information:

First: The taking, hunting, or killing of migratory game birds;

Second: Over ponds or other hunting areas by means, aid, and use of shelled grain distributed thereover so as to constitute a lure, attraction and enticement to such birds.

The first half of the 1949 duck hunting season opened for shooting at noon on October 21 [R. 72-73]. On October 8, 1949, thirty-six sacks of dried lima beans were emptied on the southwest corner of the club, which occupied about forty acres. Each sack of lima beans weighed about 100 pounds, or a total of 3,600 pounds or one and three-fourths tons. Also, it is uncontroverted that forty-one sacks of grain barley were distributed on the grounds of the club prior to the opening of the 1949 duck season. Each sack weighed about 90 pounds or a total of approximately one and three-fourths tons of grain in addition to the lima beans [R. 394-395]. Of this it is admitted by appellants that three-fourths was net grain or one and three-eighths tons, while the remaining 25% was radish seed, chaff or foreign matter [R. 398 and App. Op. Br. p. 4]. The last distribution of grain was made on October 13, 1949, or approximately one week before the shooting season opened. The evidence was conflicting on the question whether ducks would eat lima beans, but appellants concede that testimony was received from which a jury could have believed that lima beans would be eaten by ducks as feed, especially if they were hungry [App. Br. p. 5 and R. 126, 209, 213 and

332]. See also 255, 257 and 259 of Record. Appellants at no time deny or raise the issue as to whether or not grain barley such as distributed here constituted feed that ducks would eat, whether hungry or not. The testimony was that ducks and geese would definitely eat barley [R. 238]. Appellant Maxwell, who was Secretary-Treasurer of this Club [R. 267-268], was told by Deputy U. S. Game Warden Edgerton, when the feed question was raised, on October 8, 1949, that other clubs had been advised and it was mutually agreed that if they stopped feeding 10 days before the season, the *feed should* be eaten up, but it was further stipulated that under no circumstances were they *to shoot* over a baited area [R. 240]. (Emphasis ours.)

This conversation began from Maxwell's inquiry of Edgerton as to whether there had been any changes in the feeding regulations for the 1949 season [R. 267]. Appellant Maxwell then requested Edgerton to call Earl Macklin [Asst. Chief Patrol for Calif. Div. of Fish and Game—R. 319] about whether the regulations had been changed and to let him know [R. 267-268]. Macklin had a conversation with Maxwell on Oct. 19, 1949, and discussed feeding seventy-two hours before the season opened. He told Maxwell that appellant Carty brought up the question before the Fish and Game Commission at a meeting in San Francisco, Nov. 5, 1948. The question was more or less threshed out at this meeting—and Carty was told that while seventy-two hours might be a reasonable time, it made no difference whether it was seventy-two hours or eighty-six hours, the fact still remained that the feed must be cleaned up before the shooting started [R. 322-323]. Maxwell was told there was no definite

time but the feed must be cleaned up before shooting started on any club, as that would constitute a violation of Federal Regulations [R. 322]. This advice to Carty and Maxwell resulted from a legal opinion from the State Attorney General's office on the interpretation of the Federal regulation [R. 322-323]. Maxwell was told by Macklin that he felt if the club was reasonably cleaned up, there wouldn't be any arrests made and that wardens under Macklin's supervision were instructed not to make any "technical arrests." Macklin was a defense witness [R. 319, 325].

On October 22, 1949, Maxwell called Macklin and reported they had been arrested, and admitted to him that there was some feed on the premises that day [R. 330]. Macklin further testified in his opinion the grain shown in the picture shown to him, and so identified in Government's Exhibit No. 4, would be a violation [R. 334-336].

Appellants Carty and James McCormick knew there was a quantity of lima beans in the area. On the day the season opened, and after he had his limit of ducks, Carty told Jack Bedwell, who was a Deputy U. S. Game Warden, "Those beans out there look bad and they should be covered up" [R. 348, 401, 402 and 408]. He admitted that A. W. Elder, U. S. Game Management Agent, said he had warned him (Carty) in 1948 about shooting over baited ponds [R. 355].

Elder testified he inspected the Santa Clara Club on October 22, 1949, and found grain broadcast and scattered quite widely in the center of the club shooting area—barley along the cross dike—in very heavy dribbles where it appeared a sack had been carried on someone's shoulder, allowing barley to leak out where it was carried, with here

and there a little pile or so, approximately five or ten pounds estimated in each pile [R. 180-181]. He with other wardens, Bedwells, Spicer and Edgerton, saw and heard shooting in the area and ducks fall to various hunters [R. 183]. Seven appellants were arrested in the morning and two more in the afternoon. All had shot-guns, and their birds were confiscated as evidence [R. 208, 209].

Contrary to the statement made by appellants in their brief at the center of page 15, the ducks and one goose *were* offered in evidence, as follows:

“Mr. Johnson: The Government wishes to make an offer of evidence. Should counsel for the defense (Testimony of Alvin W. Elder) require them, we [190] could bring these frozen ducks and one goose into court.

Mr. Irwin: It is not necessary. I will stipulate the defendant had the ducks and the other.

Mr. Johnson: And the goose.

Mr. Irwin: That’s right.”

Government Exhibit No. 4, in evidence, was further identified as being a picture of barley on the ground, which was found in practically every foot of the premises, except cross dike No. 5 [R. 195-196]. Also, Elder saw the “lima beans spread as if the tail gate of a dump truck had been cracked open a couple of inches and backed down a road spreading them quite evenly.” Elder’s first inspection of the premises was made upon arrival at the prem-

ises about 1:00 A. M., October 22, 1949, after Warden Spicer called him at Bakersfield from the Ventura-Oxnard area, about 8:30 P. M., October 21, stating that the Santa Clara Game Preserve (appellants' club) was baited with barley [R. 177-178]. Samples of barley and lima beans were received in evidence as Government's Exhibits Nos. 12, 13 and 14 [R. 198, 200, 202 and 203].

Warden Spicer inspected the club area at night with flashlight and later returned 6:30 A. M. the 22nd, after seeing a quantity of grain everywhere, taking samples, and after meeting with Wardens Bedwell and Edgerton. They parked their cars at the edge of the Santa Clara river bottom, about two-tenths of a mile from the club and observed hunters with binoculars, later identified as appellants, on this particular club shooting ducks.

Questions Involved.

I.

Whether the Court committed error in not submitting the issue of entrapment to the jury?

A. Whether or not there was any evidence of entrapment which a jury should have passed upon as a question of fact?

II.

Whether Government Instruction 19-a was a correct statement of the law, as applied to this case?

A. If not, whether the error, if any, was harmless?

ARGUMENT SUMMARY.

Only two real issues are presented by this appeal, first whether the trial court committed error in holding as a matter of law the defense of entrapment was not available to appellants, thus refusing to submit that issue to the jury with appropriate instructions. Second, the appellants complain of Instruction 19-a which they claim left the impression with the jury that pre-season feeding was an indirect method of baiting, and therefore illegal.

Neither position taken by appellants has any substantial merit. Neither position is tenable upon the reading of the entire record of evidence and all of the instructions given. There was not the slightest degree of entrapment here by Federal Wardens or agents, within the meaning of the standard set by the leading *Sorrells* case. None of the appellants was induced, enticed or “decoyed” into shooting over baited ponds or areas. The only decoys present here were those planted by appellants, figuratively speaking. Not the floating imitation ducks as decoys, but the real entrapment in this case was the presence of grain, barley, and other feed such as lima beans in the area which the jury found constituted a lure, enticement and attraction to wildfowl to come within range of the hunters’ shotguns.

The offense as charged in the Information was that simple. Either these appellants did or did not shoot, hunt and take or attempt to take migratory birds over such a baited area. Lack of knowledge of such conditions and

the existence of grain or feed is no defense. Hunters shoot or hunt at their own peril under the law here.

However, one appellant, Carty, had been warned in 1948 by the Chief Federal Wildlife Conservation Agent, A. W. Elder. Again Carty was told at a State Fish and Game Commission meeting in San Francisco in 1948 that it mattered not how long or how short a time before the season opened that feeding stopped on the clubs, the important thing was that no grain or feed whatsoever be present in the area where hunting took place during the season. The Act and regulations specify no time limit within which pre-season feed or grain may be scattered or distributed. The controversial instruction implies that none may be put out and be left there prior to the season, and remain there after the season opens. It is uncontroverted that feeding after the season opens would be a violation.

The instructions as a whole were clear on the law as it applies to the case. When read in its proper setting, it is inconceivable that the instruction in question could have misled anyone. If any errors was committed, which is not conceded, it was harmless, the defect having been cured by other instructions.

The main purpose of the Migratory Bird Treaty Act and its regulations is to preserve and conserve our wild life resources. It provides a limited season within which ducks, geese and other migratory birds may be hunted. It prohibits hunting over baited areas. The reason for

this is to equalize the contest between hunters and birds and to prevent a possible slaughter of birds attracted by quantities of grain or food, put out as a "lure or trap."

The Act further insures good sportsmanship and applies to all hunters alike, therefore it is equitable. Congress recognized the need for regulation to perpetuate an outdoor sport that is an American tradition. To do this it is necessary for a reasonable percentage of wildfowl to reach their winter home in southern climates and return northward in the spring for nesting and reproduction. In migrating from Canada to Mexico, millions of birds fly across the United States, and stop over to feed or remain awhile on or near waters in Southern California.

The law applies to appellants here and is for their benefit in years to come as men who enjoy the sport of hunting ducks. It applies in this case to protect the privileges of other hunters, elsewhere in this country, now, and those in years to come.

The evidence is overwhelming to support the verdict of the jury finding appellants guilty. No error of law was committed by the trial court prejudicial to the appellants, and the judgment should, therefore, be affirmed.

I.

The Court Committed No Error by Not Instructing
the Jury on the Issue of Entrapment.

- A. Where There Is No Possibility of Entrapment, That Issue May Not Be Given to the Jury. It Is Only Where the Trial Court Finds There Is or May Be an Entrapment, That the Defendant Is Entitled to an Instruction Thereon.

On the basis of the record here and the evidence received herein, the defense of entrapment was not available to appellants. The trial court was justified in holding as a matter of law that no entrapment existed here and properly refused to submit the issue to the jury as a question of fact. So held in:

Brown v. United States (9 Cir., 1919), 260 Fed. 752.

To the same effect:

Farber v. United States (C. C. A. 9th), 114 F. 2d 5, at p. 10; cert. den., 311 U. S. 706.

“It is claimed that appellant was entrapped and therefore the judgment should be reversed. This defense is applicable only where the officers instigate the crime charged and committed, but does not apply, as here, where the officers discover the criminal in the doing of the crime which has already been instigated or already commenced or planned. See the leading case of *Sorrells v. United States*, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249. To allow the defense of entrapment here would be to bar conviction wherever the Secret Service allowed the crime already conceived to be carried out sufficiently to obtain evidence necessary for a conviction of the crime. The defense of entrapment is not here sustained.”

See also:

Ratigan v. U. S., 88 F. 2d 919, at 922;

U. S. v. Bates (7 Cir., 1944), 141 F. 2d 435, at 436.

Appellants rely upon the leading case on entrapment, namely, *Sorrells v. United States*, 287 U. S. 435. A re-reading of that case indicates the facts are entirely different from this one and therefore distinguished. It was a prohibition case. Sorrells was lured by the agent to commit a crime of which he was otherwise innocent. This was by repeated and persistent solicitations, and by taking advantage of the sentiment aroused by reminiscences of their experience as companions in the First World War (see page 441 of the *Sorrells* Opinion).

That case announces the well settled rule that artifice may be employed to catch those engaged in criminal enterprise and that the government may afford opportunity which of itself will not defeat prosecution.

That case concluded by holding that the defense of entrapment was available and that the trial court erred in holding as a matter of law there was no entrapment and in refusing to submit that issue to the jury.

In the present case nothing positive was done by government agents to induce or plant in the minds of appellants and create there a disposition to commit the original offense. This was pointed out by the trial court in the conference on instructions, with both counsel present [R. 466-467]. No Federal Game Warden suggested or planned the distribution of the barley and lima beans over the shooting area of the Santa Clara Club. No Federal officers procured or induced the situation of hunting over

this area by appellants at the opening of the 1949 duck hunting season. In fact the club was open to members only and their guests for hunting. Each one had to procure his own hunting license, buy his own duck stamp, supply his own shotgun, arise unusually early in the morning of the day they were arrested.

Each one had to draw "lots" at the "chuck wagon" for his location in the blinds. Each one had to fire his own shots to bring down the ducks he took that day and it requires no small degree of skill in marksmanship to do that. Each hunter proceeded to hunt at his peril in relation to the condition of baited ponds or areas at the club.

Further consideration may be disposed of in passing. In a prosecution for violation of the Migratory Bird Treaty Act, the prosecution is not required to aver or to prove at trial that a defendant had knowledge of unlawful baiting of hunting grounds in order to render him amenable to punishment for violation. Congress intended to require in this regard that hunters shall investigate at their peril conditions surrounding the fields in which they seek the quarry.

United States v. Reese, 27 Fed. Supp. 833.

That guilty knowledge or intent is not required in such cases was likewise held by the Court in *United States v. Schulze*, 28 Fed. Supp. 234 (1939), and see *United States v. Olson*, 41 Fed. Supp. 433, 434. Furthermore, it is clear that successful hunting or killing or capturing of migratory birds is not a requisite of guilt. Regulation 6.2 issued by the Fish and Wildlife Service, under the Secretary of the Interior, provides as follows: "* * * (e) Take—Hunt, kill or capture, or *attempt* to hunt, kill or capture." (Emphasis ours.)

In the pre-season inquiry by Maxwell and Carty, apparently on behalf of the others, since these two were in a favored position in the club, the wardens were told of the grain existing there and the beans. There was some discussion about the possibility of the grain or other feed being eaten or not eaten before the season opened. At no time or place did any warden tell appellants they could go ahead and shoot if grain or feed still remained there. In their brief and argument appellants urge that all the pre-season feed should have been eaten, calculated on the amount of grain a duck ordinarily eats per day, and the estimated number of ducks that should have been there. Either the ducks did not come in such numbers, or they did not eat enough to make the feed disappear. The jury found as a matter of fact there was ample grain or other feed there sufficient to constitute a lure, enticement and an attraction for the birds to come in.

The game wardens were there to investigate and enforce the provisions of the Migratory Bird Treaty Act and its regulations. They did investigate the conditions there during the night of October 21 (Spicer and Elder) and found grain and beans in quantity scattered about the club. When the appellant hunters moved in at daybreak, or later, and did shoot and kill thirty-five ducks, and one goose, it was the duty of the wardens to make arrests.

In the case of *Newman v. United States*, 299 Fed. 128, 131, 4th Cir., Judge Woods stated the principle that:

“Decoys may be used to entrap criminals and present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not

with the accused, but is conceived in the minds of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.”

The only decoys to be found in this case were not planted by federal agents, but by the appellants themselves. The only persuasion, lure and inducement on the record here is found in the existence of grain, barley and beans there to “entrap” the migratory birds to come within shooting range.

The fundamental purpose of the statute making it unlawful to hunt or kill, except as permitted by regulation, any migratory bird included in terms of conventions between the United States and countries mentioned therein for protection of migratory birds, and the regulations thereunder promulgated by the Secretary of the Interior, is the protection of migratory birds from destruction in an unequal contest between hunter and bird.

United States v. Olson, 41 Fed. Supp. 433 (1941).

As stated in the report of the Special Committee on Conservation of Wildlife Resources to the 77th Congress, 1st Session, pursuant to Senate Resolution 246 thereof:

“The ultimate objectives of the entire waterfowl program are: (1) To restore, so far as is economically possible, the breeding grounds within the continental United States; (2) to provide feeding areas along the routes of migration and in the wintering grounds in the South adequate to care for the enormous concentrations of birds that occur in the United States during the critical winter months; (3) to pro-

vide reasonable hunting privileges for the more than 1,000,000 duck and goose hunters; and (4) to so regulate the kill that the supply of birds will fully populate all available breeding areas, and thus assure continuation of the sport of wildfowling.”

See, also, in connection with the policy and purposes of the Treaty and the Congressional Act, the following:

Cerritos Gun Club v. Hall, *supra*, 96 F. 2d 620, 629, and

Shouse v. Moore, 11 Fed. Supp. 784 (1935).

Equally well settled is the proposition that hunters have no property right in migratory birds but only such permissive privileges as governmental authorities decree.

Missouri v. Holland, *supra*, 252 U. S. 416, 434;

Brandenburg v. Doyle, 12 Fed. Supp. 342, 344;

Shouse v. Moore, *supra*, 11 Fed. Supp. 784, 787.

Nor is the Government's power to protect or regulate the hunting of migratory waterfowl confined to those lands to which it has title.

It is therefore submitted there was not a scintilla of evidence of entrapment here such as existed in the *Sorrels* case. It would have been error had such an issue been submitted to the jury for their deliberation. The trial court found no entrapment in the evidence and there was none. Under such facts as were established here, Carty had been warned a year before about shooting over baited areas; Maxwell, who was Secretary-Treasurer of the Club, had been told before the season opened that under no circumstances could they shoot legally over baited areas. They went ahead and shot anyway and invited their friends or guests to shoot there. The jury found after hearing all the evidence, some conflicting, that grain and

feed did exist there in quantities sufficient to lure and entice birds. Therefore, the theory of entrapment is reduced to absurdity.

Much controversy arose over the lima beans. Carty and other appellants, or defense witnesses, as well as some of the game wardens cast some doubt on whether ducks would eat beans. Some testified they would if hungry enough. How could they defend on the theory that hunting was legal and safe, by assuming the ducks were not hungry enough? Only a duck knows when he is that hungry [See R. 256]. Appellants speculated that sufficient numbers of birds would clean up the barley, but this never happened. They were satisfied to allow the beans to remain, regardless.

That issue was immaterial anyway whether ducks would eat the beans. The real question was whether the beans constituted a lure or enticement to waterfowl in coming to that area. The jury must have so found after one direct instruction placing that issue squarely before them.

Regardless, there was ample evidence to sustain the verdict in that substantial amounts of barley were there besides, according to the testimony of Elder and Spicer as well as others. The jury evidently chose to believe their testimony in this regard as shown by their verdict. Of course the credibility of witnesses and the weight of the evidence is a matter for the jury alone, and may not be disturbed upon appeal, although the appellate court might have reached other conclusions. This principle is so well founded it requires no citations of authority. Where reasonable minds may differ on such questions of fact and there is sufficient evidence to sustain the verdict, as here, the findings of fact will not be disturbed.

II.

The Court Committed No Error in Giving the Government's Requested Instruction No. 19-A.

A. If Any Error Was Committed the Defect Was Cured by Other Instructions and Therefore Was Harmless.

The Court's Instruction No. 38 [R. 26-27] also designated as Government's Requested Instruction No. 19-A [R. 26-27] was a correct statement of the law as applied to the facts of this case. There was no prejudicial error committed in so giving this instruction which clarified the meaning of the applicable section of the Migratory Bird Treaty Act, as amended, 16 U. S. C. A. Sections 703-711, and the regulations pertinent thereto. Said instruction was based upon a construction and interpretation of the same statute and regulations made by this Court in the case of *Cerritos Gun Club v. Hall*, on April 15, 1938, as reported in 96 F. 2d 620.

In order to analyze the Court's instruction complained of by appellants, it is necessary to place that instruction in its proper setting in relation to the other instructions given by the Court immediately prior to its having been given to the jury.

The Court's instructions on the basic statute involved herein and the regulations pertinent thereto, namely, Sections 703-11 of Title 16, U. S. C. A., also known as the Migratory Bird Treaty Act, as amended, and the regulations promulgated by the Department of the Interior under the authority of said Act and in particular Section 6.3 were set forth in the following instructions which

were given to the jury in the following order. [R. 453-457 incl.]

“Section 703 of Title 16, United States Code, provides in part that:

“ ‘Unless and except as permitted by regulations made as hereinafter provided in Sections 703-710 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess,’
* * * (or) * * * ‘any migratory bird * * * included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936.
* * *

“On July 29, 1948, the President of the United States approved and proclaimed a regulation propounded by the Fish and Wildlife Service of the United States, Department of the Interior, under the authority of the Migratory Bird Treaty Act which I have just read to you. That regulation provides in Section 6.3, in part, as follows:

“ ‘Waterfowl (except for propagating, scientific, or other purposes under permit issued pursuant to Section 6.8), and mourning doves and white-winged doves are not permitted to be taken, directly or indirectly, by means, aid, or use of shelled, shucked corn, or of wheat or other grain, salt, or other feed that has been so deposited, distributed, or scattered as to constitute for such birds a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them: Provided, however,

such birds may be taken over properly shocked corn and standing crops of corn, wheat, or other grain or feed, and grains found scattered solely as a result of agricultural harvesting.'

"Thus, this regulation which I have just read to you has the effect of law, since it was propounded under the authority of the Migratory Bird Act of 1918, as amended.

"Section 707 of Title 16, United States Code, provides in part that:

" 'Any person, association, partnership, or corporation who shall violate any of the provisions of said conventions or sections 703-711 of this title, or who shall violate or fail to comply with any regulation made pursuant to said sections, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be * * * (punished as the law provides). Thus, there are two essential elements of the offense charged in the information:

"First: The taking, hunting, or killing of migratory game birds;

"Second: Over ponds or other hunting areas by means, aid, and use of shelled grain or other feed distributed thereover so as to constitute a lure, attraction and enticement to such birds.

"There has been testimony that barley and lima beans were found on the premises. It is admitted that barley is grain. The testimony is conflicting as to the amount of barley found on the Santa Clara Game Preserve. It is for your determination as to whether it was present in such quantities as to constitute a lure or enticement for the ducks present, which have been estimated variously between 4000 and 12,000 in number.

“As to the lima beans, you must first determine whether, under the terms of the regulations, lima beans are in the category of ‘other feed,’ which will lure, entice or attract migratory birds.

“You are further instructed that in a case of this sort, it is not necessary for the government to allege or to prove at trial that a defendant or defendants had knowledge of unlawful baiting over hunting grounds to find him guilty of the offense charged. In such case, guilty knowledge or intent is no part of the issue of the case. In this regard it is required that hunters shall investigate at their peril the conditions surrounding the fields and areas in which they are doing their hunting. Thus, the fact that a particular defendant may claim he did not know the area in which he was hunting was baited as charged in the information may not be considered by you in determining his guilt or innocence of the crime charged. He was under a positive duty to investigate for such conditions before hunting in the area. You are instructed that hunters have no property right in migratory birds, but only such permissive privileges as governmental authorities decree.

“Nor is the government’s power to protect or regulate the hunting of migratory waterfowl confined to those lands to which it has title.

“You are instructed that you need not be concerned whether the particular birds in this case are in fact migratory, that is, whether they have actually ever been anywhere other than California in their native haunts; for once the evidence establishes that the particular birds taken are of the species or type included in the Migratory Bird Treaty and the Congressional Act and Regulations in connection therewith, the question of whether those particular birds

actually went out of this state or were raised in this state, or whether they came from Canada, or elsewhere, is not in issue. The only issue, then, is whether the defendants hunted or killed the migratory birds as charged in the information.

“In this connection testimony has been produced to the effect that the birds taken from defendants by the enforcement officers, involved in this case, were of the following types: Sprigs, also known as Pintails, Spoonbill, Greenneck Teals, Redheads, Widgeons, and Cackling Geese.

“You are therefore further instructed that as a matter of law all birds of these types are migratory birds within the meaning of the Treaty and the statute and regulations concerned in this case.” [R. 453-457 incl.]

Immediately following the above instructions the controversial instruction designated as 19-A was given to the jury, which is as follows:

“You are instructed that the regulations concerning the baiting of migratory birds is violated whether the hunters had pursued the indirect method of baiting before the season opened so as to keep the birds in the hunting area to be shot after the season opens, whereupon the hunters may flush them as they walk or punt over the preserves, or by directly placing the grain or other feeds in front of the blinds or stands during the season.

“Furthermore, concerning the provisions in the regulation that migratory birds are not permitted to be taken ‘directly or indirectly’ by means of bait, you are instructed that the word ‘indirectly’ equally applies to any luring of the birds by grain or other

feed to the hunting area, regardless of whether the grain or other feeds is spread before the bird blinds themselves or is more widely scattered.” [R. 457-458.]

The first paragraph of the said controversial instruction was taken from page 624 of the *Cerritos* case Opinion under headnote [4], in which this Court expressed the opinion that the Secretary’s regulation would have been violated by the indirect method of baiting before the season opens, so as to keep the birds there to be shot after the first day of the season. Obviously in the light of the regulation itself this would mean that grain would still prevail in the hunting area after the opening of the season which would constitute a lure and enticement to the migratory birds. Obviously there would be no violation if the pre-season feeding of grain resulted in the grain or other food put out being consumed by the birds, or being covered up by the owners of the land, or those who desired to shoot over such premises. It is absurd to conceive of baiting the area, or spreading the grain during the open season without this resulting in a clear, intentional violation of the Act and its regulations. The only issue raised in this instruction was whether or not the jury understood the Court to say that pre-season feeding was a violation *per se*. In view of the trial court’s instruction above, to the effect that the jury was to determine whether grain was present in such quantities as to constitute a lure, or enticement for the ducks present, the first paragraph of the controversial instruction constituted a harmless error, if any.

It is inconceivable that a jury made up of reasonable men and women could be misled by such instruction to

the prejudice of the appellants. If any difficulty existed because of the wording of this paragraph of the instruction, it is submitted that it was cured by the submission to the jury of a clear issue of fact as to whether or not at the opening of the season barley and beans were present in sufficient quantities to induce or entice ducks to settle there and be shot by the hunters on the premises. This appellate court in its Opinion in the *Cerritos* case must have had the same thing in mind in its Opinion as aforesaid concerning baiting before the season opened.

On page 628 of the Opinion in the *Cerritos* case, the Court recognized that in California the feeding of grain begins weeks before the shooting season. The Court raises the question then, without answering it, did the writers of the Treaty consider baiting before or during the season a shortening of the time of the season? There is nothing in the regulations or the Act itself which expressly prohibits the pre-season scattering of grain or wild fowl feeding. However, the regulation is clear and definite in saying that no waterfowl shall be taken over areas where there exists wheat, *or other grain, or other feed*, which has been so deposited, distributed or scattered so as to constitute a lure, attraction, or enticement to, on, or over the area where hunters are attempting to take them. In view of the trial court's instruction concerning all of these things, it is submitted that no prejudicial error was committed in giving the jury this part of the instruction.

As to the second half of the instruction, the trial court again followed the example and expression of the law and its construction as applied to migratory waterfowl as set

forth in the *Cerritos* case on page 629 thereof, this Court stated the law as follows:

“Nor is there weight in appellants’ contention that there is such vagueness in terms ‘* * * Not permitted to be taken by means, aid, or use, directly or indirectly, of corn, wheat, oats, or other grain or products thereof, salt, or any kind of feed whatsoever, placed, deposited, distributed, scattered, or otherwise put out whereby such waterfowl or doves are lured, attracted, or enticed, * * *’ that the offenders are not properly advised of the offense. Common sense discloses exactly what these words mean; it being held that ‘indirectly’ clearly applies to any luring by grain of the birds to the hunting areas, regardless of whether the grain is spread before particular blinds or more widely scattered.”

On this point the Court was holding that the regulation involved in the *Cerritos* case, which was almost identical to the regulation involved here, did not lack the definiteness necessary to describe a penal offense. It further held that the making of the regulation against baiting was not a delegation of legislative powers (p. 629, Note 12). The Court went on to say:

“* * * The policy of the act is determined by section 3 of the act itself, as amended. 16 U. S. C. A. §704 and note. It is ‘to carry out the purposes of the convention,’ which are: ‘Saving from indiscriminate slaughter’ and ‘of insuring the preservation of such migratory birds as are either useful to man or harmless.’ Certainly it is ‘rationally conceivable’ by the Congress that prohibiting baited hunting will aid in preventing the extinction of the waterfowl, as the carrier pigeon was extinguished.”

Instruction 19A was given because the Court believed it to be the law in this district. The second paragraph in particular became essential since the defendants (Appellants) claimed that the “congregation of ducks was greatest away from those beans, and so on, and it was the fresh water that attracted the ducks.” The Court ruled that such was a question to be argued before the Jury. [R. 464.]

True, the *Cerritos* case was a civil action and the extracts from this Court’s opinion may have not been essential to the holding therein, therefore dictum. Yet, the gun club sought to enjoin Peirson M. Hall, then United States Attorney, and other Federal officers from prosecuting the plaintiffs for luring migratory birds to their properties with grain, there to be shot by their stockholders and members. Plaintiffs appealed from a decree dismissing this bill without leave to amend (21 Fed. Supp. 163). This Court affirmed, and upheld the validity of the Act in a well considered opinion that explored the many facets of the Migratory Bird Treaty Act and its regulations. Where then, may a trial court go for better guidance for its jury instructions on the law of a case such as the one in which appellants were tried and convicted? They were charged with shooting ducks over baited ponds, that is over an area where it was conceded and admitted that grain and lima beans were distributed in quantity prior to the opening of the 1949 hunting season. The main issue of fact submitted to the jury was whether the appellants did take or attempt to take waterfowl over an area—in violation of the Act and its regulations. This required a finding of fact on one further issue, whether grain or other feed was present there in sufficient quantity

to constitute a lure and enticement to ducks to come there and be shot by hunters. Having instructed on the elements of the case and the basic law involved, the trial court attempted to clarify and enlarge upon the meaning of the regulations. In doing so, it drew upon the language of the United States Court of Appeals in our own Circuit. It may be said that Instruction 19-a was superfluous; that it was unnecessary once the mandatory instructions on the law of the case and the elements of the offense had been stated to the jury. For men and women of ordinary intelligence this would have been sufficient for as this Court said on page 629, of the *Cerritos* case, common sense discloses exactly what the words of the regulation mean, especially the definition of "*directly* and *indirectly*." This referred to the taking of birds by means of, and the use of wheat, other grain or other feed deposited, distributed or scattered by which waterfowl are lured or attracted. Thus in the light of the excellent basic instruction here given, it is submitted that the jury could not have been misled by the one in question which could have been safely omitted. It may be that the trial court was impressed with an over-abundance of caution, or was imbued with a sense of reverence for the learned Opinion of its next higher court of review. Be that as it may, the restatement by the trial judge of this Court's construction of the meaning of the regulations was not reversible error, but was harmless, if any error was committed. None is conceded by the appellee and while the attempt at further clarity may have resulted in some ob-

scurity, yet it is submitted that the jury was given a correct statement of the law as applied to the facts of this case in the overall instructions.

That the instructions must be considered in their entirety is well established.

To this effect:

United States v. Sorcey (C. C. A. 7th), 151 F. 2d 899.

On page 901 appears the following:

“There is no requirement that any specifically framed charge be given if the general charge includes fair, comprehensive instructions upon the subject-matter involved, and in framing a charge upon the elements bearing upon credibility of witnesses, the court is not to be bound to a hard and fast formula as to each and every phase of his charge.”

Also, see:

Taylor v. United States (C. C. A. 9th), 142 F. 2d 808, at p. 817; cert. den., 323 U. S. 723.

To the same effect:

Hargreaves v. United States (C. C. A. 9th), 75 F. 2d 68, at p. 73; cert. den., 295 U. S. 759.

“It is a well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context. *Colt v. U. S.*, 190 F. 305, 308 (C. C. A. 8); *Michael v. U. S.*, 7 F. (2d) 865, 866 (C. C. A. 7).”

The rule with respect to instructions is well announced in a rather recent case, namely:

Pine v. United States (C. C. A. 5th), 135 F. 2d 353, at p. 355; cert. den., 320 U. S. 740.

“When we turn to the refused requests to charge, we must keep in mind that they are not to be considered abstractly or *in vacuo* as though the court had given no charge at all. They must be considered in their relation to the trial as a whole and especially in the light of the very full and fair general charge given, to which no exception was taken. In short, the refusal as to any of them may be regarded as reversible error if, but only if (1) it is in itself a correct charge; (2) it is not substantially covered in the main charge, and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.”

Even if error occurs in part of the instruction, such error is not reversible, if it is cured by a subsequent charge or by a consideration of the entire charge.

To this effect:

Clarke v. United States (C. C. A. 9th), 132 F. 2d 538; cert. den., 318 U. S. 789.

The rule is also well settled that when the evidence as a whole is convincing toward the defendant's guilt, reversible error does not necessarily occur from an erroneous instruction; to this effect:

Roubay v. United States (C. C. A. 9th), 115 F. 2d 49.

A *narcotic* case of this Circuit, which has been frequently quoted in other opinions and which discusses these general principles pertaining to sufficiency of instructions and the refusal to give certain specifically requested ones as not constituting error, is that of

Mullaney v. United States (C. C. A. 9th), 82 F. 2d 638, at pp. 642 and 643.

It is submitted that the above authorities when dealing with the specific subject matters appellants now complain of, such as entrapment, refusal to instruct thereon, and the giving of Instruction 19A, clearly indicate that no reversible error was committed. This contention is especially true in view of the strong proof of the guilt of the appellants, the admissions made, and the settled rule that credibility is a matter solely for the jury's determination.

Conclusion.

It is respectfully submitted that there was substantial evidence indicating the guilt of the appellants. There was sufficient, in fact, considerable evidence pointing to the guilty knowledge upon the part of appellants. However, lack of knowledge of the existence of grain or other feed in the shooting area is no defense since under the law and regulations given, hunters shoot at their peril. The appellant Carty had been warned the year before by a Federal Warden concerning the shooting over baited ponds. Another appellant, Maxwell, after his arrest, admitted to one of the wardens that there was some feed and grain scattered over the area in question. Although there was some conflict of evidence as to the amount of grain and other feed there, the jury, by its verdict, resolved that question of fact against the appellants.

The instructions, when viewed in their entirety, were fair, proper, and in accordance with the law.

In view of the presence of substantial evidence establishing the guilt of the appellants, it is submitted that no errors prejudicial to the appellants were committed in the District Court.

The issue of entrapment was not submitted to the jury and the trial court found there was no possible defense of entrapment here as a matter of law. The appellants were not entitled to an instruction on entrapment after a review of the evidence in this case.

In view of the foregoing, it is respectfully submitted that the verdict and judgment as to all the appellants should be affirmed.

Respectfully submitted,

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